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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ELISA C. DEMBROWSKI, as Trustee, etc.,

Plaintiff and Appellant,

v.

CITY OF WEST HOLLYWOOD,

Defendant and Respondent;

VENICE INVESTMENTS et al.,

Real Parties in Interest and Respondents.

B185256

(Los Angeles County Super. Ct. No. BS093109)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dzintra Janavs, Judge. Affirmed in part and reversed in part with directions.

Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, Clare Bronowski, Mark L. Block and William M. Brody for Plaintiff and Appellant.

Michael Jenkins, City Attorney; Jenkins & Hogin and John C. Cotti, for Defendant and Respondent.

Shumaker Steckbauer Weinhart, William W. Steckbauer and Ada Katz for Real Parties in Interest and Respondents.

In connection with the City of West Hollywood's approval of construction of a commercial building and parking structure on Sunset Boulevard by real parties in interest Venice Investments and Youdi Emrani (Venice Investments), the City of West Hollywood (City) determined that the project was consistent with the Sunset Specific Plan and adopted a mitigated negative declaration (MND) under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) (CEQA).[1] In her petition for writ of mandate, plaintiff Elisa Dembrowski, as trustee for the Mooh Investment Trust, owner of property adjacent to the project, challenged the determination and the MND, but the trial court entered a judgment denying the petition. We reverse the judgment because the administrative record contains substantial evidence supporting a fair argument that the project may have a significant impact on traffic, requiring the preparation of an environmental impact report (EIR) as to this issue. But we agree with the trial court's determinations that (1) there was no substantial evidence to support a fair argument that the project may have a significant impact on aesthetics and (2) substantial evidence in the record supports City's finding that the project was consistent with the Sunset Specific Plan.

BACKGROUND

In August 2003, Venice Investments filed an application, revised in March 2004, for a development permit, administrative permit, and billboard permit to construct at 8305 Sunset Boulevard a commercial building with restaurant and retail uses on the first floor and parking stalls on the second through fifth floors (the Project).

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[1] Unspecified statutory references are to the Public Resources Code.

Under CEQA, "Guidelines" refers to the regulations codified in title 14, section 15000 et seq. of the California Code of Regulations "which have been 'prescribed by the Secretary of Resources to be followed by all state and local agencies in California in the implementation of [CEQA].'" (*City of Marina v. Board of Trustees* (2006) 39 Cal.4th 341, 359, fn. 3.) Further references to "Guidelines" are to the CEQA Guidelines.

The Project site, a 20,326-square-foot parcel, is on the north side of Sunset Boulevard (Sunset), 30 feet west of the intersection of Sunset and Sweetzer Avenue. The site rises from 386 feet above mean sea level at the south edge (adjacent to Sunset) to 420 feet above mean sea level at the north or rear edge of the site. According to City's planning manager, the south portion of the property was flat, but the rear sloped upward with a 34-foot change in elevation. The site was vacant except for a billboard and a 32-stall surface parking lot. Nearby uses on Sunset included a mix of commercial, office and entertainment. Residential uses were on the hillside north of the site and multifamily residential uses were on the cross streets south of Sunset.

As originally proposed, the Project had 27,387 square feet of retail and restaurant space, but Venice Investments reduced the retail and restaurant space to about 13,000 square feet. As finally proposed in March 2004, the Project would have about 13,000 square feet of restaurant and retail space on the first floor and 192 parking stalls on the second through fifth floors. The proposed uses required only 103 parking stalls, so the Project afforded 89 extra parking spaces. The Project also included a 14-foot by 48-foot replacement billboard in the front elevation of the building, angled to be visible to motorists eastbound on Sunset. Access to the site's parking structure and service loading area would be provided by a single driveway at the west end of the site. Drivers would enter the driveway only by a right turn from the westbound direction on Sunset and would leave the site only by a right turn from the driveway onto the westbound direction on Sunset.

The West Hollywood General Plan provided that an objective of development on Sunset was to accommodate a full diversity of uses, including retail, food sales and service, entertainment, and cultural uses. Objective 5.4 of the general plan was to "[p]rovide parking requirements and public parking facilities to overcome both commercial and residential parking deficiencies and to provide for future parking needs."

The Project was also within Geographic Area 2-A of City's Sunset Specific Plan, which encouraged restaurants and pedestrian-oriented uses at all areas along Sunset and which permitted buildings up to a height of 45 feet. City's zoning ordinance provided a

method for calculating the maximum permitted height of buildings on sloping sites, and the height of the Project met the height requirements for sloping sites. The Sunset Specific Plan also required view corridors at the Project site, "unless the Director of Community Development determines that lot size or configuration would make such provision infeasible or that the provision of such open space would be inconsistent with the purpose and intent of the applicable guidelines and standards." View corridors are publicly accessible spaces along Sunset, which allow the public to view either the Los Angeles Basin or the Hollywood Hills from Sunset. Another goal of the Sunset Specific Plan was to develop and landscape the street medians, and in particular to "[e]xtend the median on Sunset Boulevard to enhance the aesthetic quality of the street." All applicants with projects of over 2,500 square feet that were not facing an existing landscaped median were required to pay into a "median fund."

The Sunset Specific Plan also required a five-foot rear setback in a commercial zone abutting a residential zone, but "[w]here a residential zone is divided from a commercial or parking zone by a significant topographic or elevation change, requirements for setbacks, landscaped buffers, or decorative walls may be waived by the Director of Community Development." Although all projects were subject to the Sunset Specific Plan, the plan provided that "the City retains discretion to approve an alternative proposal upon a showing that the alternative proposal furthers the goals stated by this plan and is consistent with the purpose and intent of the design and development requirements, guidelines, and standards that would otherwise apply to the project."

City retained the firm of HDR Engineering to prepare a traffic impact analysis for City's initial study of the original proposal. According to a March 24, 2004 letter by City's senior planner to Venice Investments, HDR Engineering's "*draft* traffic impact analysis indicated that two intersections would be significantly impacted,

(Sweetzer/Fountain and Sunset/Havenhurst).[2] During review of the draft it was anticipated that adequate mitigation measures for each of these intersections could be formulated. However after review of these mitigation measures, which would have required redirecting traffic on to a residential street, the Transportation Manager determined that the proposed mitigation measures would not be appropriate. [¶] Staff has identified two possible methods of addressing this issue. The first is to prepare an environmental impact report, which would allow the adoption of a statement of overriding considerations. A statement of overriding considerations is a document finding that although a project would result in adverse environmental impacts, there are specific overriding economic, legal, social, technological, or other considerations that would outweigh the significant unmitigated impacts. Unfortunately, it does not appear that your project meets this relatively high threshold, and therefore staff is not supportive of this approach. [¶] The second approach would be to reduce the square footage of the project to a level which would eliminate the unmitigated impacts from your proposal. . . ." (Italics added.)

On April 29, 2004, City filed a notice of intent to adopt an MND in connection with the final proposal for the Project.[3] An environmental checklist form asserted that the Project would have "less than significant impact" on the number of vehicle trips, on the ratio of the volume to the capacity on the nearby roads, and on the congestion at

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[2] Fountain roughly parallels Sunset to the south and Havenhurst runs north and south to the east of Sweetzer in the City of Los Angeles.

The record does not contain a copy of the *draft* traffic impact analysis, but only the final report, referred to herein as the Traffic Impact Analysis (TIA).

[3] "The CEQA process permits issuance of [an MND] where potentially significant environmental effects are identified but are mitigated by project revisions to a point where no significant effects would occur. (§ 21080, subd. (c); Guidelines § 15070.)" (*Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, 624, fn. 8 (*Schaeffer Land Trust*); see also *San Bernardino Valley Audubon Society v. Metropolitan Water District* (1999) 71 Cal.App.4th 382, 390.)

intersections. The checklist form also stated that the Project would have less than significant impact on a scenic vista and no impact on the existing visual character or quality of the site and its surroundings.

On June 3, 2004, a public hearing on the Project was held before City's planning commission. The planning staff report prepared for the hearing stated that, according to HDR Engineering's April 2004 TIA, two un-signalized intersections (Sunset and Havenhurst, and Sunset and Olive/Queens) operated at "LOS F" (a failing level of service) during peak hours,[4] but "[n]either . . . Los Angeles nor West Hollywood [has] specific guidelines for thresholds of significance for un-signalized intersections. Because the City has no criteria for un-signalized intersections, and these intersections would operate at LOS F with or without the project, the project is not considered to result in significant impacts to these intersections. . . ."

The TIA, attached as an exhibit to the staff report for the public hearing before the planning commission, was based on a description of the Project as set out in the final proposal. The TIA projected future traffic conditions in 2005, the anticipated opening year for the Project. Traffic data for 2004 was adjusted for ambient growth of 1 percent per year, and for the trips to be generated by 32 future projects in the vicinity of the

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[4] The TIA considered the "AM peak period" to be from 7:00 to 10:00 a.m.; the "PM peak period" was from 3:30 to 6:30 p.m.

The TIA used the methodologies in the Highway Capacity Manual (HCM) to analyze 13 intersections in the Project's area. According to the TIA, the "HCM uses the Level of Service (LOS) as a qualitative measure describing the operational condition of the roadway or intersection and assigns a letter grade [of] A through F. LOS A corresponds to a free flowing un-congested traffic stream while LOS F, at the other end of the scale, corresponds to stop and go traffic or extreme delay at an intersection." As explained in *Schaeffer Land Trust, supra,* 215 Cal.App.3d at page 623, "[a]n LOS analysis is a standardized method of rating the operating characteristics of an intersection. An LOS is a qualitative description of an intersection's quality of operation based upon delay and maneuverability. An LOS can range from A, representing free flow conditions, to F, representing jammed conditions."

Project (cumulative projects). In determining the trip distribution pattern for cumulative projects, as well as for the anticipated trips generated by the Project, the TIA allocated 90 percent of the future traffic to east and westbound travel on Sunset, 6 percent to the south, and 4 percent to the north.[5] The TIA also pointed out that because access to the parking structure was only from the westbound direction on Sunset, "some of the Project trips origination from the west of the Project site will use several alternate routes to access the Project site," with 60 percent of the project-generated traffic originating from the west using a parallel road to the south of Sunset, including Fountain or Santa Monica Boulevard, and then turning north on Sweetzer.

The TIA analyzed the future condition of the traffic at 11 intersections (during the morning and afternoon peak hours) with and without the Project. It concluded that the Project "will not have significant impacts at the intersections analyzed." That conclusion was based on the LOS analysis for evaluating the operating conditions of an intersection. According to the TIA, the only change in the LOS caused by the Project would be to worsen from LOS B to LOS C during the afternoon peak hour conditions at the intersection of Sweetzer and Fountain, south of the Project site.

The TIA also stated that the Project would be considered to have a significant impact on a *signalized* intersection in the City if the change in the ratio of vehicle volume to capacity was .02 or more for intersections with an LOS of E or worse. City had adopted the .02 ratio standard for signalized intersections as the "threshold of significance."[6] For signalized intersections in the City of Los Angeles, the TIA used the

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[5] The north-south trips were split between Crescent Heights and Sweetzer (east of the Project), and La Cienega and Queens (west of the Project).

[6] "A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant." (Guidelines, § 15064.7, subd. (a).) Although Guidelines section 15064.7 encourages a public agency to develop and publish thresholds of significance that it uses
(footnote continued on next page)

Los Angeles threshold of significance criteria, which defined a significant impact as one where the change in the ratio of the vehicle volume to capacity was greater than .01 for intersections with an LOS of E or F.

Although City had not formally adopted thresholds of significance for *un-signalized* intersections, City's past practice had been to consider a significant impact to exist if there was a change in the LOS for traffic movement from LOS D or better to LOS E or worse. The TIA noted that the Project would cause a difference in the ratio of volume to capacity of .04 (or a four percent increase in volume to capacity) at the unsignalized intersection of Sunset and Havenhurst (in the City of Los Angeles) at the peak morning period. And the unsignalized intersection at Sunset and Olive/Queens would suffer an 18 percent increase in volume to capacity in the afternoon peak period. But the TIA did not consider these changes to be significant impacts because the intersections were already operating at LOS F during peak hours and were "already failing."[7]

(footnote continued from previous page)

to determine the significance of environmental effects, a threshold of significance "is not conclusive, however, and does not relieve a public agency of the duty to consider the evidence under the fair argument standard. [Citations.] A public agency cannot apply a threshold of significance or regulatory standard 'in a way that forecloses the consideration of any other substantial evidence showing there may be a significant effect.'" (*Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 342 (*Mejia*).)

[7] City's and Venice Investments's appellate briefs assert, for the first time, that the TIA shows that the .18 figure does not show a difference in the ratio of volume to capacity for Sunset and Olive/Queens, but only a .18 *increase in capacity*. They maintain that the proper interpretation of the TIA indicates that if the Project is built, there would be various increases in capacity at 8 of the 11 intersections studied. We agree with Dembrowski that this interpretation of the TIA is erroneous, and adopt Dembrowski's interpretation of the TIA as set out her reply brief. In short, respondents' interpretations are absurd because it is not possible for the intersections' capacities to increase without any road widening or other circulation improvements, and no such improvements are mentioned in the TIA.

With respect to the issue of the building height and setback standards of the Sunset Specific Plan, the staff report for the planning commission hearing concluded that the Project was consistent with those development standards.[8] As to the view corridor, the staff report stated that "the Sunset Specific Plan permits this standard to be waived if the Community Development Director determines that the lot size or configuration would make such a view corridor infeasible. Due to the steep topography of the site . . . and the dense, off-site foliage located north of the site, there is no feasible opportunity to provide a view corridor from Sunset Boulevard through this site."

Opponents of the Project testified at the hearing before the planning commission. A representative of a neighbor at 8410 Sunset, across the street from the Project site, testified that the neighbor had a view corridor and that the landscaping to the north of the Project did not impact the view corridor to the Los Angeles Basin. Two City residents, Jeffrey Smith and G.G. Verone, testified that eastbound cars on Sunset unable to turn left into the Project's parking structure will turn down Sweetzer and then De Longpre, where the cars will make a U-turn and then return to Sweetzer to make a left turn onto Sunset so as to be able to turn into the parking structure. According to Verone, traffic circulation on Sweetzer and De Longpre was going to be "a real nightmare."

On June 3, 2004, the planning commission adopted a resolution approving an MND and various permits for the Project. The resolution stated in pertinent part: "This project has been evaluated in accordance with the California Environmental Quality Act, and it has been determined that although this proposal may result in significant

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[8] Although about 75 percent of the site was flat, a portion of the site would be excavated so that the Project would be built on a flat surface from front to back. As explained by City's planning manager at the appeal hearing before the city council, "the zoning ordinance allows you to take the maximum height, which is in this case 45 feet from whatever the elevation is at the front and whatever it is at the back, and then at a 2 to 1 ratio, draw an imaginary envelope, if you will. . . . We look at existing grade . . . prior to construction. We look at the existing natural grade at the site."

Measured from Sunset, the height of the Project was 53 feet.

environmental impacts, these impacts will be reduced to less than significant level through implementation of mitigation measures incorporated into this resolution as conditions of approval. [¶] . . . [¶] . . . In order to mitigate potential circulation related impacts access to the project is permitted only by right turns in to or out of the site, and all commercial deliveries are required to be carried out on-site, with trucks re-entering Sunset Boulevard in a forward direction." The resolution also contained the findings that "[t]he proposed use is consistent with the objectives, policies, general land uses and programs of the West Hollywood General Plan because Policy 1.18.10 of the General Plan provides that development on Sunset Boulevard shall 'accommodate a full diversity of retail specialty, food sales and service . . . entertainment and/or cultural uses.' Furthermore the project is consistent with the development standards of Geographic Area 2-A of the Sunset Specific Plan, with regards to height, which is 45 [feet], provision of an average 15 foot setback between the building and the curb, and a minimum clear area of ten feet between the curb and other project elements such as outdoor dining and landscape planters and low, decorative walls."

The adjacent property owner to the north of the Project and a resident of a condominium located northeast of the Project filed appeals of the planning commission's decision to the city council. The adjacent property — owned by the Mooh Investment Trust, of which Elisa Dembrowski is the trustee — is in the City of Los Angeles and contains a residence 100 feet from the property line. Dembrowski's appeal contended that the Project did not comply with various provisions of the Sunset Specific Plan and that the MND was inadequate under CEQA because the Project may have significant impacts on, among other things, views, aesthetics, and traffic. In connection with the appeal to the city council, Dembrowski submitted a report prepared by a traffic consulting engineer, Arthur L. Kassan, who reviewed the TIA.

Among other things, the three-page Kassan report criticized the TIA in the following respects: (1) The TIA lacked trip generation estimates for the Project, so "the estimates of development traffic that would use each intersection could not be checked for reasonableness." (2) The TIA should have analyzed traffic impacts during the noon

period because the noon period was one of two peak periods for the Friday of the traffic counts, but the analyses used only the morning peak hours before 9 a.m. and the afternoon peak hours after 4 p.m., notwithstanding that 78 percent of the Project would consist of restaurants that would have a higher trip generation during the lunch period than during the morning peak period. (3) Notwithstanding the TIA's statement that traffic was often congested and pedestrians provided significant traffic interruptions during the late night peak hours, the TIA contained no quantitative analysis of the Project's traffic impacts during the late night peak period.[9] (4) Because a significant portion of development in the area was to the south of Sunset, the TIA's assignment of only 6 percent of Project-generated traffic to the streets to the south was unreasonable, with 25 to 35 percent being a more reasonable distribution to the streets to the south. (5) The TIA did not address how the "right-in/right-out only" entry and exit restrictions would be enforced because there was no raised median or other device on the street to make left turns difficult or impossible; it was likely that there would be a high level of disobedience to the left turn prohibitions. (6) The TIA fails to discuss the routes taken by drivers leaving the Project and heading toward the east and the impacts of that traffic.

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[9] The TIA thus explained the decision *not* to analyze weekend late night peak times: "In discussions with the City, turning volumes for the weekend late night peak were not evaluated directly. Due to the various restaurants and clubs having heavy usage during the weekend late night (Fridays and Saturdays), the traffic is often congested within the study area. There [are] heavy pedestrian volumes providing significant traffic interruptions. It was agreed, in discussions with the City, that using weekend late night volumes will not depict an accurate simulation of traffic patterns. Observing [but not collecting data on] the traffic patterns and the interactions between pedestrian, motorists and buses during this period was deemed appropriate." HDR Engineering then conducted a field study of (that is, observed) the traffic at the Project site from 10 p.m. to midnight on a Saturday night in January 2004. According to those observations, the traffic volumes on Sunset were heavy and approached capacity, pedestrians crossing Sunset disrupted the north bound left turn traffic, traffic to and from the north leg of Sweetzer was negligible, and the northbound traffic on Sweetzer turning left and right to Sunset was evenly distributed.

The Kassan report concluded that the TIA "should be remedied to present a more realistic and appropriately conservative analysis of the impacts of the proposed development. In my opinion, incorporation of the recommended changes to the analysis, such as an appropriate redistribution of development traffic from/to the south, analyses of development traffic impacts at the mid-day and late night peak hours, and analyses of the impacts of U-turns by development traffic at nearby intersections, may result in the identification of significant traffic impacts in this congested part of the City."

The planning staff report prepared for the appeal hearing before the city council summarized the issues raised by the appellants, addressed those issues, and recommended that the city council affirm the planning commission's approval of the Project. In planning staff's response to the appellants' contentions regarding a view corridor, the staff report stated that "[d]ue to the steep topography of the site, which rises from 386 feet AMSL (Above Mean Sea Level) at the south (front) edge of the site to 420 AMSL feet at the north (rear) edge of the site, and the dense, off-site foliage located north of the site, views from Sunset Boulevard through the site are limited to the landscaping on the southern border of the directly adjacent residential property. No panoramic views of the hillsides or the ridgeline are available from this site. Therefore integration of a view corridor into the proposed development of this site would not meet the intent of the view preservation and enhancement objectives in the Specific Plan."

With respect to the setback, height standards, and buffer for residential neighbors facing the 20-foot rear wall, the staff report stated that "[t]he Sunset Specific Plan requires that a five-foot setback be provided on lots where commercial development is proposed next to residentially zoned property. The proposed project meets this requirement. Furthermore the proposed setback area will be landscaped to buffer the rear wall of the parking structure. Staff notes that because of the existing grade of the lot, the proposed rear wall is approximately twenty feet tall where a wall of forty-five above grade would be permitted."

In response to charges that the Project violated the requirement that the developer pay into a "median fund," the staff report explained that the "existing striped median

provides an important travel lane for emergency vehicles, and this would be lost with the construction of a raised median. Therefore the City's Department of Transportation, in response to Fire and Sheriff's Department comments, is not implementing the raised landscape median requirement along this stretch of Sunset Boulevard."

As to the MND and the impacts on aesthetics and traffic, the staff report stated that "[t]he appellant has not provided any specific examples of how the [Project] would result in significant impacts in these areas. . . ."

At a public hearing before the city council on September 20, 2004, numerous local residents testified regarding the Project's aesthetic and traffic impacts and asserted that the Project was inconsistent with the Sunset Specific Plan. City of Los Angeles Councilman Jack Weiss also submitted a letter stating in part that "the Los Angeles Department of Transportation (LADOT) was not consulted in this study (the TIA). . . . The traffic study for this project appears to be inadequate. LADOT would like to see the impacts of the project, particularly those at the intersection of Crescent Heights and Sunset Boulevard, . . . re-evaluated based on LADOT guidelines."

A condominium resident at 8341 Sunset testified that the residents were concerned about the access to the Project and access to another building at 8335 Sunset, "which already backs up traffic on Sunset [and] is some concern to us that it will continue to just expand the gridlock that's already there on Sunset." A letter by nearby resident Jack Illes stated that there were 11 driveways with access to Sunset in the block of the Project, "creating significant hazards for both vehicles and pedestrians. At peak times, vehicles accessing existing parking areas stack on to Sunset, blocking through-traffic and creating consistent gridlock on weekend evenings. Even now, life safety vehicles — police, fire and paramedics — are unable to access private residences at these times, creating life-threatening issues for residents and a liability for the [City]. Currently the only viable access to Sunset on this block at peak weekend times is via Sweetzer, which will be effectively gridlocked by this new parking structure entry. . . . The current proposal will bring traffic to a complete standstill, rendering the entire neighborhood virtually uninhabitable on weekend evenings."

Steven Afriat testified that there were no guarantees that the Project's parking structure will be available for public use and that the TIA failed to study the increase in traffic due to the parking use even though the Project would be "a destination for parking as well as a destination for the retail uses."

With respect to whether the 20-foot rear wall of the parking structure was sensitive to residential neighbors, the planning manager testified that one of the conditions attached to the approval of the Project was to require that the rear wall be screened with 70 giant timber bamboo trees and creeping fig, and "the combination of the bamboo and the creeping fig will provide mitigation of a blank wall and will, in fact, be a landscaped wall . . . ."

The city council unanimously approved a resolution denying the appeals, adopting the planning staff's responses to the grounds for the appeals, upholding the planning commission's findings, and upholding the approval of an MND and the permits to construct the Project.

Dembrowski filed a petition for a writ of mandate seeking to set aside City's approvals of the Project on two general grounds: (1) Under CEQA, City was required to prepare an EIR rather than an MND because of significant impacts on traffic and aesthetics and (2) the Project was inconsistent with provisions of the Sunset Specific Plan regarding view corridors, rear walls, rear setback, sensitivity to adjacent residential neighborhoods, and contribution to a landscaped median fund.

After briefing and oral argument, the trial court denied the petition for a writ of mandate and entered a judgment in favor of City and Venice Investments. Dembrowski appealed from the judgment.

DISCUSSION

A. Standard of Review for Decision to Adopt an MND

"'CEQA requires a governmental agency [to] prepare an [EIR] whenever it considers approval of a proposed project that "*may* have a *significant* effect on the environment."' [Citation.] 'If there is no substantial evidence a project "may have a significant effect on the environment" or the initial study identifies potential significant

effects, but provides for mitigation revisions which make such effects insignificant, a public agency must adopt a negative declaration to that effect and, as a result, no EIR is required. [Citations.] However, the Supreme Court has recognized that CEQA requires the preparation of an EIR "whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact." [Citations.] Thus, if substantial evidence in the record supports a "fair argument" significant impacts or effects may occur, an EIR is required and a negative declaration cannot be certified.' [Citation.]" (*City of Arcadia v. State Water Resources Control Bd*. (2006) 135 Cal.App.4th 1392, 1421.)

And even if there is substantial evidence to the contrary, whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact, an EIR must be prepared. (*Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 580 (*Bowman*).) Because a negative declaration ends environmental review, "[t]he fair argument standard is a 'low threshold' test for requiring the preparation of an EIR. [Citations.] It is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency's determination. Review is de novo, *with a preference for resolving doubts in favor of environmental review*." (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928 (*Pocket Protectors*).) Under this standard, deference to the agency's determination not to prepare an EIR is not appropriate and such decision can be upheld only when "'there is no credible evidence to the contrary.'" (*Mejia*, *supra*, 130 Cal.App.4th at p. 333.)

Environment is defined as "the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (§ 21060.5.) A "'"'[s]ignificant effect on the environment' means a substantial, or potentially substantial, adverse change in the environment." [Citations.]'" (*Pocket Protectors*, *supra*, 124 Cal.App.4th at p. 927, citing § 21068 and Guidelines, § 15382.) "May" means a reasonable possibility. (*Pocket Protectors*, *supra*, 124 Cal.App.4th at p. 927.)

"There is no 'gold standard' for determining whether a given impact may be significant. 'An ironclad definition of significant effect is not always possible because the significance of an activity may vary with the setting." (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1107 (*Amador Waterways*).) A regulatory standard or threshold of significance (see fn. 6, *ante*) cannot be applied in a way that would foreclose the consideration of other substantial evidence showing that there may be a significant environmental effect from a project and "the agency must still consider any fair argument that a certain environmental effect may be significant." (*Id.* at pp. 1108–1109.) And an EIR is required if there is substantial evidence that *any aspect of the project* may cause a significant environmental effect. (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 309 (*Sundstrom*).)

"'Substantial evidence' means 'enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.' (Guidelines, § 15384, subd. (a).) Substantial evidence 'shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.' (Guidelines, § 15384, subd. (b).) 'Argument, speculation, unsubstantiated opinion or narrative, [or] evidence which is clearly erroneous or inaccurate . . . does not constitute substantial evidence.' (Guidelines, § 15384, subd. (a).)" (*Pocket Protectors, supra*, 124 Cal.App.4th at pp. 927–928.)

"Relevant personal observations of area residents on nontechnical subjects may qualify as substantial evidence for a fair argument. [Citations.] So may expert opinion if supported by facts, even if not based on specific observations as to the site under review. [Citation.] Where such expert opinions clash, an EIR should be done. (Guidelines, § 15064, subd. (g).)" (*Pocket Protectors, supra*, 124 Cal.App.4th at p. 928.) Thus, an adjacent property owner may testify to traffic conditions based upon personal knowledge. (*Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 274 (*Banker's Hill*).) But "CEQA places the burden of environmental investigation on government rather than the public. If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on

the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences." (*Sundstrom, supra*, 202 Cal.App.3d at p. 311; see also *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1378–1379.)

"Under the Guidelines, a project will normally have a significant effect on the environment if it will '[c]ause an increase in traffic which is *substantial in relation to* the existing traffic load and capacity of the street system.' (Guidelines, appen. G, § XV, subd. (a), italics added.)" (*Banker's Hill, supra*, 139 Cal.App.4th at p. 277.)

B. Traffic

Dembrowski argues that, viewed as a whole, the record reveals a fair argument that the Project may have a significant impact on traffic circulation in the area.[10] We agree.

City's finding that the Project would not have a significant impact on traffic circulation was based on the reasoning, as set out in the TIA, that there was no significant impact at several intersections because the "baseline" condition at those intersections (which baseline included future cumulative projects) was already classified as "failing" even without consideration of the expected impacts of the Project. But as asserted by Dembrowski in her reply brief, "A baseline of heavy traffic does not justify additional environmental degradation. In fact, both the City of West Hollywood and the City of Los

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[10] We reject Venice Investments's contention that we should not consider the arguments made in section IV.C.3. of Dembrowski's opening brief. They assert that the arguments made in this portion of Dembrowski's brief were waived for failure to raise them in the trial court. The principal argument in section IV.C.3. is that City improperly characterized the traffic impacts as insignificant on the basis that the intersections were already failing. But that point was indeed raised by Dembrowski below, in pages 7 and 8 of her reply to the opposition to the petition for writ of mandate. And, as pointed out in Dembrowski's reply brief on appeal, the "failing" level of traffic conditions at the intersections of Sunset at Olive/Queens and Sunset at Havenhurst and City's baseline argument were addressed below in City's and Venice Investments's oppositions and in Dembrowski's trial court memorandum of points and authorities and reply.

Angeles traffic thresholds of significance expressly recognize that the more congested the 'baseline' of traffic conditions, the *less* increase in traffic is necessary to trigger a significant impact." We agree with Dembrowski that the conclusion in the TIA that the Project would not have a significant impact on traffic circulation is legally unfounded and inconsistent with the purpose and objectives of CEQA.

"'The foremost principle under CEQA is that the Legislature intended the act "to be interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language."'" (*Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1443.) Guidelines section 15065 provides in pertinent part: "(a) A lead agency shall find that a project may have a significant effect on the environment and thereby require an EIR to be prepared for the project where there is substantial evidence, in light of the whole record, that any of the following conditions may occur: [¶] (1) the project has the potential to substantially degrade the quality of the environment . . . ."

We conclude that City's adoption of an MND with respect to traffic impacts is inconsistent with the object of CEQA to afford the fullest possible protection to the environment and with the requirement in Guidelines section 15065 that an EIR be prepared when a project has the potential to substantially degrade the quality of the environment. We also conclude that the TIA's application of the LOS rating system in this case violates the principle that a regulatory standard cannot be applied in a way that forecloses the consideration of substantial evidence showing that there may be a significant impact. (*Mejia*, *supra*, 130 Cal.App.4th at p. 342.)

A similar rationale to that of City herein has been rejected by the majority of the courts which have considered it in the context of cumulative impacts. In *Los Angeles Unified School District v. City of Los Angeles* (1997) 58 Cal.App.4th 1019 (*LAUSD*), the EIR for a specific plan which would permit the development of a 1.5 square mile area did not include an analysis of additional traffic noise and air pollution on two schools in the area. The EIR found that "the additional traffic noise near the schools would be 'insignificant' and additional air pollution would occur throughout the project area

despite any feasible mitigation measures." (*LAUSD, supra,* 58 Cal.App.4th at p. 1023.) The Court of Appeal determined that (1) section 21083 — requiring an EIR if the "possible effects of a project are individually limited but cumulatively considerable" in connection with the effects of past, current, and probable future projects (see § 21083, subd. (b)(2)) — governed both the agency's determination of whether to prepare an EIR as well as the contents required to be in an EIR once it is determined an EIR must be prepared and (2) that the EIR violated the statutory requirement regarding cumulative impacts. (*LAUSD*, *supra*, 58 Cal.App.4th at pp. 1024–1025.)

As explained by the court in *LAUSD*: "The EIR in the present case reasons the noise level around the schools is already beyond the maximum level permitted under Department of Health guidelines so even though traffic noise from the new development will make things worse, the impact is insignificant. This same reasoning was rejected in [*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 718 (*Kings County*).] There, the EIR concluded the increased ozone levels from the proposed cogeneration plant would be insignificant because the plant would emit relatively minor amounts of precursors, compared to the total volume of precursors already emitted in Kings County. This ratio theory, the court explained, 'trivialize[d] the project's impact' by focusing on individual inputs, not their collective significance. 'The relevant question to be addressed in the EIR is not the relative amount of precursors emitted by the project when compared with preexisting emissions, but whether any additional amount of precursor emissions should be considered significant in light of the serious nature of the ozone problems in this air basin.' (*Ibid.*) [¶] Likewise, the relevant issue to be addressed in the EIR on the [specific] plan is not the relative amount of traffic noise resulting from the project when compared to existing traffic noise, but whether any additional amount of traffic noise should be considered significant in light of the serious nature of the traffic noise problem already existing around the schools. We do not know the answer to this question but, more important, neither does the City; and because the City does not know the answer, the information and analysis in the EIR regarding noise levels around the schools is inadequate." (*LAUSD*, *supra*, 58 Cal.App.4th at pp. 1025–1026.)

Disagreeing with *LAUSD* and *Kings County*, the court in *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1996) 42 Cal.App.4th 608 (*San Joaquin Raptor*) stated that the problem with treating as equivalent the requirement that an EIR discuss cumulative impacts and the requirement that impacts be "cumulatively considerable" in order to trigger preparation of an EIR in the first instance (see § 21083, subd. (b)(2)) is that it would make the need for an EIR turn on the impact of other projects, not on the impact of the project under review. (*San Joaquin Raptor*, *supra*, 42 Cal.App.4th at pp. 623–624.)

The court in *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98 (*Communities*) endorsed the views in *LAUSD* and *Kings County* and rejected the analysis in *San Joaquin Raptor*. The court in *Communities* concluded that "the need for an EIR turns on the impacts of *both* the project under review and the relevant past, present and future projects. . . . This does not mean, however, that *any* additional effect . . . *necessarily* creates a significant cumulative impact; the 'one [additional] molecule rule' is not the law." (*Id*. at pp. 119–120.) The court in *Communities* also reasoned that "the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant. But [language in *San Joaquin Raptor*] runs counter to this concept and puts the cart before the horse. This is because that language would effectively adopt a higher threshold 'comparative approach' for deciding whether to prepare an EIR, and a lower threshold 'combined approach' for governing a cumulative impact discussion in an EIR." (*Communities*, *supra*, 103 Cal.App.4th at p. 120, fn. omitted.)

Viewed a whole, the instant record contains substantial evidence showing a reasonable possibility that the Project may have a potential adverse impact on traffic conditions in the area of the Project. The TIA itself contains data and conclusions which corroborate the personal observations of the Project's opponents. For example, the TIA establishes that during the morning and afternoon peak periods, two intersections on Sunset will suffer changes in the volume to capacity ratio of 18 and 4 percent, which changes are above City's thresholds of significance. That these two intersections are

unsignalized and that City does not apply the threshold of significance standards based on volume to capacity ratio to unsignalized intersections does not mean that this data cannot be considered to be evidence of a significant impact. And because the TIA noted that on Fridays and Saturdays, the two highest peak times were noon and afternoon, and that pedestrians caused "significant traffic interruptions" during the weekend late night hours, a reasonable inference is that had the noon and late night periods been figured into the study in the TIA, there is a reasonable possibility that more intersections with an LOS of D or better may have been rated at an LOS E or F.

It is also reasonable to infer that had City redistributed more development traffic to the south, as suggested by Kassan, more severe impacts would have been projected to occur at more of the intersections. And it is reasonable to infer that there would be more development traffic to the south because, of the 32 other future projects in the area, only three were on or north of Sunset.

In sum, the TIA, the Kassan report, and the testimony of nearby residents of the "gridlocked" traffic conditions already existing on Sunset on the weekends permit the reasonable inference that the Project's impact on the already existing traffic problems in the area may have the potential to degrade significantly the level of traffic circulation and to constitute a significant effect on the environment. Accordingly, the record contains substantial evidence to support a fair argument that the Project may have a significant impact on traffic circulation, which requires City to prepare an EIR. We need not discuss the type or scope of the EIR that City should prepare.

We are not persuaded otherwise by *Schaeffer Land Trust*, *supra*, 215 Cal.App.3d 612, characterized by respondents as an analogous case. *Schaeffer Land Trust* is not analogous because the issue there was the adequacy of the EIR's discussion of cumulative traffic impacts, not the determination of whether an EIR should be prepared, as here. The standard of review of an agency's decision to certify an EIR requires that the court presume the correctness of the decision, that the project opponents bear the burden of proving that the EIR is legally inadequate, and that the court not substitute its

judgment for that of the decision makers. (*Amador Waterways, supra*, 116 Cal.App.4th at p. 1106.) That is not the standard which governs our review.

C. Aesthetics

We reject Dembrowski's contention that there is substantial evidence to support a fair argument that the Project may have significant aesthetic impacts because of its alleged "massive unarticulated blank [rear wall]," the four-foot, six-inch rear setback, the height of the structure, and the obstruction of views of the hillside to the north from nearby residences and from Sunset.

"Any substantial negative effect of a project on view and other features of beauty could constitute a significant environmental impact under CEQA." (*Ocean View Estates Homeowners Assn. v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396, 401.) "'Under CEQA, the question is whether a project will affect the environment of persons in general, not whether a project will affect particular persons.'" (*Banker's Hill, supra*, 139 Cal.App.4th at p. 279.) Thus, "'obstruction of a few private views in a project's immediate vicinity is not generally regarded as a significant environmental impact.'" (*Ibid*.)

The record does not contain substantial evidence that the rear wall of the Project will be blank or unarticulated; rather, the evidence established that the plan contemplated landscaped screening on the rear wall. Nor is there substantial evidence that the height and setback features of the Project may have a negative effect on aesthetics. Assuming for purposes of the issue of aesthetics under CEQA that the height and setback features are not consistent with the requirements of the Sunset Specific Plan, any alleged deviations from the plan's requirements are minor and do not rise to the level of a significant environmental impact.

As aptly stated in *Bowman, supra*, 122 Cal.App.4th at pages 592–593: "While there may be situations where it is unclear whether an aesthetic impact like the one alleged here arises in a 'particularly sensitive' context (Guidelines, § 15300.2) where it could be considered environmentally significant, this case does not test that boundary. The aesthetic difference between a four-story and a three-story building on a commercial

lot on a major thoroughfare in a developed urban area is not a significant environmental impact, even under the fair argument standard. [¶] . . . [¶] [A]esthetic issues like the one raised here are ordinarily the province of local design review, not CEQA. That the cases addressing such issues have arisen under local ordinances rather then CEQA is supportive of that view."

Finally, although a project that interferes with scenic views may have an adverse aesthetic effect on the environment (*Bowman*, *supra*, 122 Cal.App.4th at p. 586), there is no substantial evidence that the Project would interfere with scenic views of persons in general. No evidence refuted the statement in the staff report that the steep topography and the dense foliage on the property north of the Project site precluded any northern view corridor from the site. Accordingly, City properly determined that an EIR was not required on the issue of aesthetics.

D. Sunset Specific Plan

Dembrowski contends that the Project is inconsistent with provisions of the Sunset Specific Plan pertaining to view corridors, sensitivity to residential neighbors, walls of parking structures facing residential areas, a five-foot rear setback, and contributions to a landscaped median fund.

A project is consistent with a general plan and any specific plan adopted to further the objectives of the general plan if, considering all its aspects, it is compatible with the objectives, policies, general land uses and programs specified in the plan. (*Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1509 (*Sierra Club*).) "In reviewing an agency's decision for consistency with its own plan, 'we accord great deference to the agency's determination. This is because the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity. [Citation.] . . . A reviewing court's role "is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies." [Citation.]' [Citation.]" (*Id*. at pp. 1509–1510.)

Because general and specific plans attempt to balance a range of competing interests, it is impossible for a project to be in perfect conformity with each and every policy set forth in the applicable plan. (*Sierra Club*, *supra*, 121 Cal.App.4th at pp. 1510–1511.) "An agency, therefore, has the discretion to approve a plan even though the plan is not consistent with all of a specific plan's policies. It is enough that the proposed project will be compatible with the objectives, policies, general land uses and programs specified in the applicable plan." (*Id*. at p. 1511.)

A determination of consistency can be overturned only for abuse of discretion, that is, if the agency did not proceed legally or if the determination is not supported by the findings or the findings are not supported by substantial evidence. (*Families Unafraid to Uphold Rural etc. County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1338.)

1. View Corridors

The Sunset Specific Plan provides: "URBAN DESIGN REQUIREMENTS [¶] . . . *Views to the Hills: Mass and design development on Site 2-A so as to preserve northward views from the Boulevard to the hills.*"

Dembrowski maintains that the hill *on* the rear of the Project site is part of the view which the Sunset Specific Plan protects. But this interpretation of the plan would preclude development on the site and would be inconsistent with the 45-foot height requirement for the site. City reasonably interpreted the view corridor provisions to apply to off-site views of the hills to the north, not to the view of the site itself.

Substantial evidence supports the determination that the Project is consistent with the plan provision and that the Project does not block any required "northward views from [Sunset] Boulevard to the hills." The Project's architect testified before the planning commission that "it's not possible to really see an extent of the mountains beyond the [adjacent] foliage . . . ." The architectural drawings in the record also establish that dense foliage on the property adjacent to the Project on the north exceeded the elevation of the Project so that any potential views of the hills to the north were already blocked. In other words, substantial evidence supports the conclusion that the

Project would have no effect on any protected view corridor that would otherwise exist and is compatible with the Sunset Specific Plan in that respect.[11]

2. Sensitivity to Residential Neighbors and Design of Rear and Side Walls

One of the objectives of the Sunset Specific Plan is to "[e]nsure that new commercial development in the area is sensitive to adjacent residential neighborhoods." An urban design standard and guideline for buffers between commercial and residential zones provides: "Parking structures shall have all walls facing residential areas designed as facades, compatible with the context." As a buffer between residential and adjacent commercial or parking uses, the plan required a "decorative masonry wall."

Dembrowski contends that the 26-foot rear wall and the 55-foot east wall face residential areas and violate the foregoing provisions. But the Plan also provides that "[w]here a residential zone is divided from a commercial or parking zone by a significant topographic or elevation change, requirements for setbacks, landscaped buffers, or decorative walls may be waived by the Director of Community Developments."

Substantial evidence supports the conclusion that the Project's rear wall satisfied the requirement of the Sunset Specific Plan for a decorative wall because the wall was to be landscaped with plants. The east wall did not directly abut a residence, but another commercial property operating as a restaurant. Accordingly, any residential view of the east wall of the Project would necessarily include the adjacent restaurant, which itself would act as a buffer with respect to the east wall of the Project.

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[11] Assuming that some views of the sky were required, the Project's architect testified before the planning commission that "we did create a kind of a cut into the building that allows sky views looking up through, from Sunset. And so we . . . would break down the scale of the building at the front where you've kind of eroded it at the billboard, does create an area that does give you more of a view up the hill. And softens . . . the texture of that building against the hill. The building itself terraces clear across, and then there's a deep cut in the building at the center. [¶] . . . [¶] . . . I think it's more of a sky view than really a view of the mountains, because the mountains step back so far in that particular junction."

Substantial evidence also establishes that the east wall indeed met the decorative facade requirements of the plan. As stated in the planning staff reports prepared for the public hearings: "The danger of a four story building with parking above retail is that it can be a scale-busting monolith. The designers have wisely broken the building into three sections. The middle section reveals the essential nature of the building by allowing the floor slabs and railings of the garage to be visible. The two end bays each have a different design strategy. The east bay allows floor bays with wire railings to peek through a series of large screen like elements. . . . The building elements are the right size, bold enough to read as independent and contrasting elements of varied materials, but not so large as to be overwhelming or alienating. The building has a balance of both strong vertical and horizontal elements."

We conclude that substantial evidence supports the finding that the Project was compatible with the objectives and policies of the Sunset Specific Plan with respect to walls facing residential zones.

3. Five-Foot Rear Setback

Dembrowski contends that the Project conflicts with the mandatory five-foot rear setback because the rear wall is less than five feet from the residential property to the north.

It is not certain from this record whether the Project indeed complied with the five-foot setback. The planning staff report for the hearing before the city council stated that "[t]he proposed project meets this [five-foot setback] requirement." Assuming that the setback was only four feet, six inches, as contended by Dembrowski, the plan expressly permits the director of community development to waive the setback requirement where a residential zone is divided from a commercial zone by significant topographic or elevation changes. Here, an architectural drawing showed that the adjacent rear residence was over 100 feet away from the Project and about 40 feet above it. The adjacent residence was also separated from the Project by terraces and landscaping. Substantial evidence supports the determination that the Project's rear setback was compatible with the policies and objectives of the Sunset Specific Plan.

4. Landscaped Median Fund

Dembrowski faults City for failing to require Venice Investments, the Project's applicants, to pay into a fund earmarked for a landscaped median. But City found that the existing median was an important travel lane for emergency vehicles that would be lost with the construction of a landscaped median and City was therefore not implementing the landscaped median requirement along the stretch of Sunset at the Project site. City's determination with respect to the landscaped median fund constituted a reasonable balance of competing interests and policies.

We conclude that Dembrowski has failed to meet her burden of establishing that City's determination that the Project was compatible with the policies and objectives of the Sunset Specific Plan is not supported by substantial evidence.

DISPOSITION

That part of the judgment denying the petition for a writ of mandate on the ground that the approval of the Project by the City of West Hollywood did not violate the Sunset Specific Plan is affirmed. That part of the judgment denying the petition for a writ of mandate on the ground that City did not violate the California Environmental Quality Act is reversed, and on remand the trial court is to enter a new judgment granting the petition for a writ of mandate on grounds consistent with the views herein. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

We concur:

ROTHSCHILD, J.

JACKSON, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.